JOHN T. FEY, Clerk

No. 438

In the Supreme Court of the United States

OCTOBER TERM, 1957

WOMETCO TELEVISION AND THEATRE COMPANY,
APPELLANT

v.

UNITED STATES OF AMERICA AND MIAMI BEACH THEATRE CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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Pursuant to Rule 16, paragraphs 1 (a) and 1 (c), of the Revised Rules of this Court, the appellee United States of America moves to dismiss the appeal upon the ground that the orders which have been appealed are not appealable by appellant (*Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19), and moves, in the alternative, to affirm the appealed orders upon the ground that the questions upon which the decision of the cause depends are so unsubstantial as not to require further argument.

The orders which have been appealed were entered in a proceeding pursuant to provisions of the consent judgment entered against Loew's Incorporated (Loew's) on February 7, 1952. That judgment terminated as to this defendant the Government's Sherman Act proceeding against the country's principal motion picture exhibitors and distributors, which proceeding has twice been before this Court (*United States* v. *Paramount Pictures,* 334 U. S. 131; *Loew's Inc.* v. *United States,* 339 U. S. 974).

Under Section X of the judgment, jurisdiction of the cause was retained for the purpose of enabling "any of the parties to this consent judgment and no others" to apply to the court at any time for such orders as may be necessary or appropriate for the construction, modification or carrying out of the judgment provisions.

Appellee Miami Beach Theatre Corp., a wholly-owned subsidiary of Loew's Theatre & Realty Corporation, applied to the district court for permission to acquire and operate a theatre to be erected in Dade County, Florida, at a place about ten miles north of downtown Miami Beach and seven miles south of downtown Hollywood, Florida, in an area occupied by many motels. The application was made pursuant to Section III, 7, (b) of the judgment, which provides that after the divorcement and divestiture provisions of the judgment have been carried out, the New Theatre Company to be created pursuant to the judgment's divorcement provisions may not acquire a new theatre interest unless the New Theatre Company

shows to the satisfaction of the court, and the court shall find, that "the acquisition will not unduly restrain competition."

Loew's Theatre & Realty Corporation is the New Theatre Company created to carry out the divorcement provisions of Section V of the judgment. This section provides that, in order to effect a divorcement of Loew's theatre interests from its other assets, it shall consummate a plan of reorganization providing for transfer of all its theatre interests to the New Theatre Company in exchange for the latter's stock, and that, subject to certain contingencies, Loew's shall distribute this stock pro rata to its stockholders. The section further provides that, until Loew's distributes the stock of the New Theatre Company to its stockholders, Loew's and the New Theatre Company shall be "operated wholly independently of each other," and that one-half of the latter's board of directors shall be approved by the court and "subject to its direction."

Under III, 3, (b), of the judgment, Miami Beach Theatre Corp. is entitled to an order by the court approving acquisition of a new theatre upon a showing and court finding that the acquisition will not unduly restrain competition. The fact that Loew's has not, to date, distributed to its stockholders the stock of the New Theatre Company is immaterial.[1]

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[1] The reason for the nondistribution is the difficulty in refinancing Loew's funded debt (amounting to $40,000,000 at the time of the judgment) so as to bring about a division of debt between Loew's and the New Theatre Company giving for each "a reasonably prudent financial position." See Sec. V, par. C, of the judgment.

The provisions for such distribution are contained in paragraph C of Section V of the judgment, and a note attached to paragraph 7 (a) of Section III states: "For the purpose of this paragraph 7, divorcement shall not be deemed incomplete by reason of any action or conduct under or pursuant to paragraphs C and D of Section V, or either of them."

Appellant moved for leave to intervene in opposition to the petition filed by Miami Beach Theatre Corp. The district court by its order of July 1, 1957 denied this motion, but granted appellant leave "to be heard as an amicus curiae." The court, after having heard argument by appellant's counsel, by counsel for appellee Miami Beach Theatre Corp., and by counsel for the Government, entered a further order on July 10, 1957, in which order the court, after finding that the proposed acquisition will not unduly restrain competition, authorized Miami Beach Theatre Corp. to acquire the theatre to be erected in the Sunny Isles Area of Dade County, Florida. The foregoing orders are those which have been appealed.

At the hearing, counsel for the Government categorically denied that the Government ignored complaints by exhibitors relating to matters arising under judgments entered in the *Paramount* case, and he stated that the Government evaluates every such complaint and does something about those which are meritorious (Tr. 48). He further stated that Loew's Theatre & Realty Corporation had only one theatre in the entire Miami, Miami Beach, Hollywood and Ft. Lauderdale resort area, the Riviera Theatre, which is approximately 24 miles from the proposed new thea-

tre (Tr. 8); that if the new theatre obtains first-run pictures, it will be one of a substantial number of others playing first-run in the Miami Beach area, and that if it operates subsequent-run, there will be approximately eight subsequent-run theatres within an eight mile area (Tr. 11); that the Government opposed any court restriction on first-run showings by the new theatre because this would protect first-run theatres in downtown Miami Beach, where appellant has first-run theatres, against additional first-run competition (Tr. 53); that persons in the area in which the new theatre is to operate now have to go about ten miles to see first-run showings (Tr. 53); and that the question of whether or not the new theatre would be able to obtain first-run pictures should be determined by "competitive forces" (Tr. 54).

ARGUMENT

Appellant contends (J. St. 3–6) that it is entitled to intervene as of right under clauses (2) and (3) of Rule 24 (a) of the Federal Rules of Civil Procedure.[2] In *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, the decree which had been entered in a Sherman Act proceeding by the Government prohibited the defendant National Cash Register

[2] Rule 24 (a) provides that upon timely application anyone shall be permitted to intervene in an action "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

from acquiring control of any company which makes or sells cash registers unless the court, on defendant's petition, should determine that the acquisition will not substantially lessen competition. On the filing of such a petition, Allen Calculators applied for leave to intervene in opposition to the petition. The district court entered an order denying intervention and, after a hearing, entered a further order authorizing the proposed acquisition subject to certain conditions, and Allen Calculators appealed to this Court alleging error in the denial of intervention.

Thus the basic facts and issues in *Allen Calculators* precisely parallel those here. This Court, in holding that the appellant could not intervene as of right under either clause (2) or clause (3) of Rule 24 (a), said that the intervention application did not fall under clause (2) because "the appellant clearly would not be bound by any judgment in the action", and that it did not come under clause (3) because appellant did not have "any interest in the distribution or disposition of property in the custody of the court." 322 U. S. at 141. The Court also said that since the decree which gave rise to the intervention application did not give the appellant the right to intervene, *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, was not applicable (*ibid.*).

The present appellant also contends (J. St. 6), as did the appellant in *Allen Calculators*, that the district court abused its discretion in denying permissive intervention under clause (2) of Rule 24 (b), which authorizes permissive intervention "when an applicant's claim or defense and the main action have a

question of law or fact in common". Rule 24 (b) also provides: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

On the question of whether appellant's claim and the main action have "a question of law or fact in common", appellant's only showing was (1) that Miami Beach Theatre Corp.'s petition presented the issue of whether the proposed theatre acquisition will unduly restrain competition, and (2) "Under the Sherman Act, Clayton Act and general equitable principles, Wometco [the present appellant] would have a right to enjoin petitioner [Miami Beach Theatre Corp.] from acquiring this theatre if it appeared that such acquisition would unreasonably restrain competition" (Wolfson affidavit, p. 5). We submit that appellant, by this vague characterization of the nature of its claim, "has not maintained the burden of showing" that its intervention application comes within Rule 24 (b) (2). See *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 22.

But irrespective of whether appellant has sustained the burden of establishing the applicability of Rule 24 (b) (2), it is manifest that the district court did not abuse its discretion in denying intervention, in order to avoid undue delay or prejudice in adjudication of the rights of the original parties. In *Allen Calculators*, which held that denial of permissive intervention upon this ground was not an abuse of discretion, the Court said that "exercise of discretion in a matter of this sort is not reviewable by an appel-

late court unless clear abuse is shown * * *". 322 U. S. at 142. It further said (*ibid.*):

> It was, *inter alia,* to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees.[3]

In *Sutphen Estates* the Court, in holding that there had been no abuse of discretion in denying leave to intervene under Rule 24 (b), said that the district court "had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere." 342 U. S. at 23.

The contentions which appellant wishes to press in the role of intervenor illustrate the delay and prejudice to the rights of the parties to the main action likely to result should intervention be allowed. Appellant seeks to raise, among other questions, the validity of the provisions of the judgment which permit the court to approve new theatre acquisitions prior to distribution of the stock of the New Theatre Company to Loew's stockholders (J. St. 17–18), and numerous issues relating to the prior court approval of the New Theatre Company's acquisition of the Riviera Theatre (J. St. 13–14; Tr. 20–26).

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[3] A footnote cites *United States* v. *California Canneries*, 279 U. S. 553.

In the prolonged *Paramount* proceedings this is at least the eleventh time in which intervention has been denied. In *United States* v. *Loew's, Inc.*, 136 F. Supp. 13, 14 (S. D. N. Y.), the court, in denying intervention under circumstances precisely like those here, stated that an examination of the records in the *Paramount* case showed that at least nine previous attempts to intervene in that proceeding had met with failure. Furthermore, when such rulings were appealed, this Court had upheld denial of intervention.[4]

In other Sherman Act proceedings brought by the United States, district courts have uniformly refused to permit private parties to intervene in the absence of consent by the United States or a judgment provision authorizing intervention.[5] In the *Bendix* case cited in footnote 5, the district court said (10 F. R. D. at 76–77):

> But certainly where, as in the case at bar, the United States has taken no action under the decree against the defendant; where, indeed, the United States has sifted the proposed intervenors' complaints and has decided to oppose the intervention, it would violate the statutory policy to allow the petition. Intervention would tend to make the private parties quasi

[4] *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680 (motions to dismiss granted); *Ball* v. *United States*, 338 U. S. 802 and *Partmar Corp.* v. *United States*, 338 U. S. 804 (motions to affirm granted); *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19 (appeal dismissed).

[5] *United States* v. *Bendix Home Appliances*, 10 F. R. D. 73 (S. D. N. Y.); *United States* v. *American Society of Composers, Authors and Publishers*, 11 F. R. D. 511 (S. D. N. Y.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D. N. J.); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137.

attorneys general in enforcing the anti-trust laws, in contravention of 15 U. S. C. A. § 4 and 15 U. S. C. A. § 25 which explicitly require that Government suits shall be under the direction of the Attorney General.

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is therefore respectfully submitted that the appeal should be dismissed or the judgment of the district court should be affirmed.

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